(2) Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

CAROLYN KENNEDY,

Petitioner,

v.

DRESSER RAND,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Kennedy

Plaintiff(s)

v. 6:97-cv-06015

Dresser Rand Co.

Defendant(s)

PLEASE take notice of the entry of an ORDER filed on 11/24/98, of which the within is a copy, and entered 11/25/98 upon the official docket in this case. (Document No. 25.)

Dated: Rochester, New York
November 25, 1998

RODNEY C. EARLY, Clerk
U.S. District Court
Western District of New York
2120 U.S. Courthouse
100 State Street
Rochester, New York 14614

Enclosure
TO:

Luciano L. Lama, Esq.
Eugene D. Ulterino, Esq.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CAROLYN M. KENNEDY,

Plaintiff DECISION and ORDER

-vs- 97-CV-6015

DRESSER RAND COMPANY,

Defendant

This is an action in which the plaintiff claims that her employer discriminated against her, in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Now before the Court are the defendant's motion for summary judgment and the plaintiff's cross-motion for sanctions. For the reasons that follow, the plaintiff's cross-motion for sanctions is denied, the defendant's motion for summary judgment is granted, and the complaint is dismissed with prejudice.

BACKGROUND

The plaintiff began working for the defendant part-time as an occupational nurse in 1978. Between 1979 and 1995, the plaintiff worked full-time. Between 1985 and 1995, the plaintiff came to believe that she was being "harassed" by her supervisor, Dennis Emo. This alleged harassment took the form of two job reassignments, a few critical evaluations, and criticism of the plaintiff's attitude. The plaintiff did receive negative evaluations and

criticism from supervisors other than Mr. Emo during that period. During her seventeen years as an employee, the plaintiff received annual performance evaluations, with ten overall ratings of commendable, four overall ratings of satisfactory, and two overall ratings of fair.[1] The plaintiff's overall rating in 1995 was fair, with a 2.5 numerical rating. The lowest rating during this period was in 1989, when the plaintiff received an overall rating of fair, and a numerical rating of 2. During all other years, the plaintiff received overall ratings of either commendable or satisfactory, with numerical ratings of either 4 of [sic] 3. During this same period, the plaintiff was given average annual salary increases of 5.53%. 1989 and 1995 were the only years in which the plaintiff did not receive a salary increase. In October of 1995, Mr. Emo reassigned the plaintiff from one set of duties to another, apparently lateral, set of duties, which reassignment upset the plaintiff very much. On December 20, 1995, the plaintiff notified the defendant that she had been diagnosed with depression. Prior to that, the plaintiff had never been diagnosed with depression, and had never notified the defendant that she was suffering from depression or any other physical or mental impairment. In her December 20th letter, the plaintiff stated that her depression was the result of "continuous, unrelenting mistreatment and unnecessary harassment" by her supervisor, Dennis Emo. The letter further stated that

> demand is hereby made for accommodations such that she be relieved from reporting to, associating with or otherwise being subjected to

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[1] No overall rating was given in 1979.

> the antics of Mr. Emo. Additional accommodations may be required relative to Mrs. Kennedy's job duties.

Although the letter mentions "additional accommodations," the only accommodation that the plaintiff has ever requested is that she be relieved of reporting to or dealing with her supervisor, Mr. Emo. By letter dated January 12, 1996, the plaintiff's counsel again wrote to the defendant and stated, in relevant part, that

> we made our first demand for reasonable accommodations in our letter of December 20, 1995, and we consider that request, to date, denied or otherwise ignored. We further consider the failure of Dresser-Rand to act as its first violation of the Americans With Disabilities Act. We hereby again, demand that reasonable accommodations be made for Ms. Kennedy by Dresser-Rand by eliminating all personal contact with Mr. Emo including written communications and phone calls.

In response, the defendant requested that the plaintiff provide medical documentation, so that the defendant could evaluate her request. The plaintiff provided two letters, one from a Dr. Jana Pulkrabek, M.D., and one from a William J. Lasher, M.D.[2]. Dr. Pulkrabek's letter states, in relevant part, that the plaintiff "suffers from depression . . . and insomnia." Dr. Lasher's letter states,

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[2] Neither letter is on physician's letterhead, and as the defendant contends, it appears that both letters were in fact drafted by the plaintiff's counsel, although they were signed by the doctors.

in relevant part, that the plaintiff "suffers from depression and insomnia," and that "[t]he primary accommodation necessary for her safe return to work is the removal of the influence of her current supervisor, Dennis Emo." The defendant refused to grant the plaintiff's requested accommodation, and although it does not dispute that such an accommodation would have been theoretically "possible." Sometime in January of 1996, the plaintiff voluntarily stopped working at Dresser-Rand, although she contends that the defendant's refusal to accommodate her "constructively terminated" her employment. Some time after January of 1996, while out of work on disability, the plaintiff attended educational seminars and conferences for which she requested reimbursement from the defendant, however the defendant has refused to reimburse her. The plaintiff claims that the defendant's refusal to reimburse her is retaliatory, although she cannot identify any similarly situated employee who has received such reimbursement. The plaintiff also claims that after she left the company, the defendant retaliated against her by refusing to return certain personal belongings. However, the defendant states that it had been advised by the plaintiff's counsel to have no direct contact with the plaintiff, and that the items of personal property were in fact returned to the plaintiff, through her counsel. Since January of 1996, the plaintiff has not obtained other employment.

On January 14, 1997, the plaintiff commenced this action. She contends that the defendant failed to accommodate her, constructively terminated her, and retaliated against her. The complaint alleges, inter alia, that the

> plaintiff suffers from a disability as is defined by the Americans with Disabilities Act to wit: plaintiff has been diagnosed with major depression (DSM IV: 296.20) and insomnia, post traumatic stress disorder (DSM-IV: 309.21)[3] and as a result thereof, plaintiff suffers disturbances in sleeping, eating, inability to concentrate and fatigue. As a result of said disability, plaintiff has not been able to perform any gainful employment. Plaintiff has been tearful, anxious and extremely depressed, severely limiting her major life activities.
>
> * * *
>
> Plaintiff suffers from physical and mental impairments . . . that substantially limit one or more of the major life activities, to include caring for oneself, performing manual tasks, walking, seeing, learning, remembering, sleeping and the ability to secure and retain employment.

The defendant moved for summary judgment on August 10, 1998. In her affidavit submitted in opposition to the defendant's motion for summary judgment, the plaintiff states that at the present time, she suffers from

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[3] Although the plaintiff claims that she suffers from post-traumatic stress disorder, the defendant's expert psychiatrist, David J. Barry, M.D., concluded that she did not meet the definition for post-traumatic stress disorder. When the plaintiff's own psychiatrist, Dr. Lasher, was asked at his deposition if he agreed with Dr. Barry's analysis, he responded, "[s]trictly speaking, yes, I'd agree with that, if you go by the direct definition." JoAnn Morse-Clough, the plaintiff's clinical social worker, also testified that the plaintiff had not experienced a traumatic event within the meaning of a post-traumatic stress disorder diagnosis.

depression and insomnia, which causes her to feel "tired everyday." She also states that on some days, the fatigue, depression and insomnia cause her to be "tearful, exhausted and incapable of any activity at all." However, in the plaintiff's answers to the defendant's first set of interrogatories, the plaintiff stated, in relevant part, that

> [p]laintiff considered herself a Dresser Rand employee with a temporary disability, which could be resolved any day. Plaintiff fully believed that she would be able to return to work if she did not have to report to Dennis Emo.

(Emphasis added). On April 4, 1996, approximately four months after she stopped working, the plaintiff's clinical social Worker, JoAnn Morse-Clough, noted that

> Carolyn was feeling very good. She had actually applied for a job that was involving a company in Texas but would allow her to be able to work out of her home . . . Though she is not as invested in the outcome of this application, she is very pleased that she could follow through with it. She thought it was very symbolic of her changes and her beginning to feel as though she was capable of taking care of herself . . . She greatly misses work . . . and would very much like to try to return to that organization if she does not have to have the same supervisor.

After she stopped working at Dresser Rand, the plaintiff returned to college and earned her bachelor's degree in psychology, and she continued to attend other educational courses and seminars. At present, the plaintiff still claims to suffer from depression and insomnia, however, she continues to assert that she is ready, able and willing

to return to work at Dresser Rand, as long as she does not have to interact with Dennis Emo.

In addition to opposing the defendant's motion for summary judgment, the plaintiff has cross-moved for sanctions pursuant to Fed. R. Civ. P. 37, claiming that two employees of the defendant, who were deposed on January 14, 1998 and March 4, 1998, were "evasive, gave incomplete answers, caused waste of time and lied." Pursuant to a scheduling order of this Court, factual discovery in this action was completed on March 15, 1998. The plaintiff has never made any motion to compel in relation to the alleged discovery abuses, and apparently has made no effort to resolve this discovery dispute with opposing counsel before seeking sanctions from this Court.

ANALYSIS

First, the plaintiff's cross-motion for sanctions is denied. Any motion to compel involving the subject depositions should have been made on or before March 15, 1998, the deadline for all factual discovery. Moreover, pursuant to Fed. R. Civ. P. 37(a)(2)(B), any such motion to compel "must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action." The plaintiff has not included this certification, nor has she offered any explanation for why she waited until approximately five months after the close of factual discovery before making this motion. Accordingly, this motion is denied.

The standard for granting summary judgment is well established. Summary judgment may not be granted

unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists. *See, Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). "[T]he movant must make a prima facie showing that the standard for obtaining summary judgment has been satisfied." 11 Moore's Federal Practice, § 56.11[1][a] (Matthew Bender 3d ed.). In moving for summary judgment against a party who will bear the ultimate burden of proof at trial, the movant may satisfy this burden by pointing to an absence of evidence to support an essential element of the nonmoving party's claim. *See, Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once that burden has been established, the burden then shifts to the non-moving party to demonstrate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). To carry this burden, the non-moving party must present evidence sufficient to support a jury verdict in its favor. *Anderson*, 477 U.S. at 249. Summary judgment is appropriate only where, "after drawing all reasonable inferences in favor of the party against whom summary judgment is sought, no reasonable trier of fact could find in favor of the non moving party." *Leon v. Murphy*, 988 F.2d 303, 308 (2d Cir. 1993).

The Americans With Disabilities Act (ADA) provides in relevant part that

> [n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . the hiring, advancement, or discharge of employees, employee compensation . . . and other terms, conditions and privileges of employment.

42 U.S.C. § 12112(a). The Rehabilitation Act requires, in relevant part, that

> [n]o otherwise qualified individual with a disability in the United States . . . shall solely by reason of her or his disability, be . . . subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794(a). Under both the ADA and the Rehabilitation Act, "a plaintiff can establish a prima facie case . . . by showing (1) that he is an individual who has a disability within the meaning of the statute, (2) that an employer covered by the statute had notice of his disability, (3) that with reasonable accommodation, he could perform the essential functions of the position sought, and (4) that the employer has refused to make such accommodations." *Stone v. City of Mount Vernon,* 118 F.3d 92, 96-97 (2nd Cir. 1997), *cert. denied,* 140 L.Ed.2d 109, 118 S.Ct. 1044 (1998). In order to demonstrate that she is disabled, the plaintiff must prove two elements: "(1) that she has a physical or mental impairment; and (2) that such impairment substantially limits one or more of her major life activities." *Wernick v. Fed. Reserve Bank of New York,* 91 F.3d 379, 383 (2d Cir. 1996). "The regulations define major life activities as "[sic] functions such as caring for one's self, performing manual tasks, walking,

seeing, hearing, speaking, breathing, learning, and working." [sic] *Id.* (*citing* 45 C.F.R. § 84.3(j)(2)(ii) (Rehabilitation Act) and 29 C.F.R. § 1630.2(h)(2)(i) (ADA)). The term "substantially limits" is defined as meaning, in relevant part.

> [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1)(ii).

The plaintiff bears an initial burden of production to demonstrate that the requested accommodation is reasonable. *Stone*, 118 F.3d at 98. To carry this initial burden, "[i]t is enough for the plaintiff to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits." *Id.* (*citing Borkowski v. Valley Cent. School Dist.*, 63 F.3d 131, 138 (2d Cir. 1995). If the plaintiff fails to suggest such a plausible accommodation, she has not established a prima facie case, and the claim must be dismissed. *See, D'Amico v. City of New York*, 132 F.3d 145, 151-52 (2d Cir. 1998), *cert. denied*, 141 L.Ed.2d 151, 118 S.Ct. 2075 (1998).

The first issue that the Court must address is whether or not the plaintiff is disabled. For purposes of this motion, the Court will assume that the plaintiff's depression and insomnia constitute physical or mental impairments under the Americans With Disabilities Act and the Rehabilitation Act. Next, the Court must examine whether or not these impairments substantially limit a major life activity. With respect to the major life activity

of working, the term "substantially limits" means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. *Wernick*, 91 F.3d at 383-84 (*citing* 29 C.F.R. § 1630.2(j)(3)(i)).

In its motion for summary judgment, the defendant argues that the plaintiff is not disabled, because her impairments do not substantially limit the major life activity of working. The defendant further argues that even if she were disabled, her requested accommodation is not reasonable. At oral argument of this motion, the plaintiff's counsel conceded that her impairments do not substantially limit the major life function of working. However, the plaintiff does maintain that her impairment's substantially limit the major life functions of sleeping and eating, among others. The plaintiff also notes that the defendant has admitted that it would be "possible" to assign her to a new supervisor. Therefore, the plaintiff argues, she is a qualified person with a disability under the statutes, and summary judgment should be denied since a factual issue exists as to whether or not the accommodation she requests is reasonable. Assuming for purposes of this motion, that the plaintiff is a qualified person with a disability, the Court nonetheless finds her argument regarding the requested accommodation to be without merit.

The only accommodation that plaintiff has requested is that she be allowed to have absolutely no interaction with her former supervisor, Dennis Emo. However, the

plaintiff concedes that this accommodation will not change her situation. As of January 1998, two years after she stopped having any interaction with Mr. Emo, the plaintiff claimed to still suffer from depression and insomnia. And, as the plaintiff's counsel argued in his memorandum of law,

> [w]hen Mr. Emo is removed from her world, her depression does not disappear, nor does her posttraumatic stress disorder, her loss of appetite, loss of weight, loss of sleep and her need for medical and psychiatric care.

Moreover, the replacement of a supervisor is not a plausible accommodation. *See, Wernick,* 91 F.3d at 384. As the court in *Wernick* stated, "nothing in the law leads us to conclude that in enacting the disability acts, Congress intended to interfere with personnel decisions within an organizational hierarchy." *Id.* Because the plaintiff has failed to demonstrate that her requested accommodation is reasonable, she has failed to establish a prima facie case, and her claims for failure to accommodate under both the Rehabilitation Act and the Americans With Disabilities Act must be dismissed. *See, D'Amico,* 132 F.3d at 151-52.

The plaintiff's retaliation claims must also be dismissed. To state a claim for retaliation, the plaintiff must show "(1) participation in a protected activity know [sic] to the defendant, (2) an employment action disadvantaging the plaintiff, and (3) a causal connection between the protected activity and the adverse employment action." *Querry v. Messar,* 14 F.Supp.2d 437, 450 (S.D.N.Y. 1998) (*citing Gallagher v. Delaney,* 139 F.3d 338, 349 (2d Cir.

1998)). With respect to the claim that the defendant retaliated against the plaintiff by refusing to reimburse her for expenses she incurred while out of work on disability, the plaintiff has failed to demonstrate that she was entitled to such reimbursement and has failed to identify any similarly situated employee who was reimbursed. With respect to the claim that the defendant wrongfully withheld the plaintiff's personal property after she requested it, the defendant has established that it was directed by the plaintiff's counsel not to have any direct contact with the plaintiff, and that accordingly, the defendant returned the plaintiff's property to the plaintiff's attorney, instead of returning it directly to the plaintiff. The plaintiff did not come forward with any evidence to refute the defendant's evidence presented on these two points, nor did the plaintiff address these retaliation claims in its memorandum of law. Accordingly, the Court finds that the plaintiff has failed to make out a prima facie case of retaliation, and those claims must also be dismissed.

Finally, in opposing the defendant's summary judgment motion, the plaintiff has raised, for the first time, the claim that prior to December of 1995, the defendant "knew or should have known" that the plaintiff suffered from a disability, and that the defendant discriminated against the plaintiff prior to December of 1995. Not only was this claim not alleged in the complaint, it is directly contrary to the plaintiff's counsel's own statement to the defendant, in January of 1996, that "[w]e further consider the failure of Dresser-Rand to accommodate the plaintiff as requested in the plaintiff's December 20, 1995 [letter] as its first violation of the Americans With Disabilities Act." (Emphasis added). Moreover, this claim was not

raised before the EEOC. Therefore, this claim is not properly before the Court, and must be dismissed.

CONCLUSION

Accordingly, the defendants' motion for summary judgment [#15] is granted in all respects and the complaint herein is dismissed with prejudice. The defendant's cross motion for sanctions [#22] is denied.

So ordered.

Dated: Rochester, New York
November 23, 1998

ENTER:

/s/ Charles J. Siragusa
CHARLES J. SIRAGUSA
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CAROLYN KENNEDY,

Plaintiff,

v.

DRESSER RAND COMPANY,

Defendant.

NOTICE OF APPEAL

(Filed Dec. 14, 1998)

Case No.: 6:97-CV-06015

SIRS:

PLEASE TAKE NOTICE that the Plaintiff hereby appeals to the Court of Appeals, Second Circuit, from a decision rendered on the 25 day of November, 1998, and from each and every part thereof and from each and every intermediate order therein made.

Dated: December 7, 1998
Ithaca, New York

Yours, etc.,

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